UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	*Criminal No. 95-71-P-H*
	)	*(Civil No. 99-30-P-H)*
CHRISTIAN CASTRO,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255

The defendant moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 108 months was imposed after he was convicted by a jury on a charge of conspiracy to possess more than five grams of cocaine base with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. Judgment (Docket No. 65) at 1-2. The defendant now contends that he received ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution. Petition Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Motion") (Docket No. 73) at 5 and attached Memorandum of Fact and Law in Support of Motion, etc. ("Defendant's Memorandum") at 4.

A section 2255 motion may be dismissed without an evidentiary hearing if "(1) the motion is inadequate on its face, or (2) the movant's allegations, even if true, do not entitle him to relief, or (3) the movant's allegations need not be accepted as true because they state conclusions instead of facts, contradict the record, or are inherently incredible." *David v. United States*, 134 F.3d 470, 477

(1st Cir. 1998) (internal quotation marks and citation omitted). In this instance, each of the defendant's allegations meets one or more of these criteria. Accordingly, I recommend that the motion be denied without an evidentiary hearing.

I. Background

As the First Circuit stated in its opinion denying the defendant's appeal from his conviction:

> A federal grand jury indicted the [defendant] on a charge of conspiring to possess cocaine base (crack cocaine) with intent to distribute. *See* 21 U.S.C. §§ 841(a)(1) & (b)(1)(B), 846. The charge arose out of the [defendant's] supposed involvement in a multi-faceted drug trafficking ring. The evidence at trial, viewed in the light most favorable to the government, showed that the conspiracy flourished in mid-1994. The [defendant's] role was to deliver crack cocaine between Lawrence, Massachusetts and Lewiston, Maine. Upon arriving in Lewiston, the [defendant] would stay at one of several dwellings in which other coconspirators resided and would supervise the ensuing "retail" sales. The coconspirators were geographically dispersed and communicated largely by telephone. Many of the telephone numbers that they used were listed under false names.
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> At trial, the government presented a very strong case against the [defendant]. Among other things, several self-styled members of the conspiracy testified for the prosecution and inculpated the [defendant].

United States v. Castro, 129 F.2d 226, 228 (1st Cir. 1997) (citation omitted).

II. Discussion

A. Applicable Legal Standard

Strickland v. Washington, 466 U.S. 668 (1984), provides the applicable standard for assessing whether a defendant has received ineffective assistance of counsel such that his Sixth Amendment right to counsel has been violated. First, the defendant must show that his counsel's performance

was deficient, i.e., that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Second, the defendant must make a showing of prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The court need not consider the two elements in any particular order; failure to establish either element means that the defendant is not entitled to relief. *Id.* at 697. The "prejudice" element of the test presents the defendant with a high hurdle. He must show more than a possibility that counsel's errors had some conceivable effect on the outcome of the proceeding. Rather, he must affirmatively prove a reasonable probability that the result of the proceeding would have been different if not for counsel's errors. *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996).

B. The Defendant's Claims

The defendant lists four issues in the memorandum that accompanies his motion, one of which addresses only the remedy that the defendant contends would be appropriate if this court determines that he is entitled to section 2255 relief. Defendant's Memorandum at 4. Accordingly, I would ordinarily discuss only the three substantive claims under the Sixth Amendment that appear to be raised by the motion.

Before considering the specific claims, however, it is necessary in this case to address the government's contention that this proceeding should be dismissed because the factual allegations that support the defendant's motion, all of which are contained in the memorandum accompanying the motion itself, are not sworn as required by Rule 2(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts. The defendant has signed the motion itself under penalty of perjury, Motion at 7, but no such affirmation appears on the accompanying memorandum.

The memorandum does include the following statement:

> The Petitioner avers pursuant to 28 U.S.C. § 1746 and under the penalties of perjury that he never received any advice by his attorney, Paula Watson of 85 Exchange Street, P.O. Box 447 DTS, Portland, Maine 04112, on whether he should plead guilty and accept the government's plea agreement.

Defendant's Memorandum at 5. The memorandum is signed, but not dated. *Id*. at 18. It includes a certification, "pursuant to 28 U.S.C. § 1746,"[1] of service on the United States Attorney. *Id*. at [19].

The First Circuit has held that "[f]acts alluded to in an unsworn memorandum will not suffice" to support a section 2255 motion. *United States v. Labonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev'd on other grounds*, 137 L.Ed.2d 1001 (1997). Accordingly, the only fact properly presented to the court by the defendant, who had an opportunity to, but did not, correct this flaw in his submission after it was identified in the government's memorandum in opposition, is the one quoted above. Any argument based on any other factual assertions included in his memorandum must be disregarded by the court.

The government contends that the court may not even rely on the single factual allegation quoted above, however, because the reference to the penalties of perjury by which it is accompanied do not meet the requirements of 28 U.S.C. § 1746, in that the affirmation does not appear at the end

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[1] The statute provides, in relevant part:

> Wherever, under any law of the United States or under any rule . . . made pursuant to law, any matter is required . . . to be supported . . . by the sworn declaration . . . in writing of the person making the same . . . , such matter may, with like force and effect, be supported . . . by the unsworn declaration . . . in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
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> * * *
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> **(2)** If executed within the United States . . . : "I declare . . . under penalty of perjury that the foregoing is true and correct. Executed on (date)."

28 U.S.C. § 1746.

of the memorandum and is not dated. Government Opposition to Motion to Vacate, Set Aside, or Correct Sentence and Supporting Memorandum of Law ("Government's Opposition") (Docket No. 76) at 18. As the statute itself provides, substantial compliance with its terms is sufficient. While the affirmation in this case precedes rather than follows the only factual allegation which it supports, that means only that any other factual allegations in the memorandum have not been so affirmed. As to that single allegation, compliance with the statutory requirement is substantial. *See generally Kersting v. United States*, 865 F. Supp. 669, 676 (D. Haw. 1994). The lack of a date in the affirmation or next to the signature on the memorandum is not a fatal flaw, so long as the date or approximate date of the signature is demonstrable. *EEOC v. World's Finest Chocolate, Inc.*, 701 F. Supp. 637, 639 (N.D.Ill. 1988); *but see Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994) (undated affidavits signed under penalty of perjury must be excluded from consideration). Here, the memorandum was submitted with and incorporated by reference in a motion signed by the defendant and dated January 28, 1999. Motion at 7. The memorandum and motion were received in this court on February 9, 1999. Docket. These facts demonstrate that the memorandum was signed on, or approximately on, the same date as the motion. Nothing more is required.

However, one of the substantive claims pressed by the motion is based on an assertion that the defendant's trial attorney failed to conduct an investigation before the defendant's lawyer rejected the alleged "plea offer." Defendant's Memorandum at 4, Point II. Because there are no properly presented factual allegations to support the existence a plea offer or the absence of an investigation by the defendant's attorney, this court may not consider this claim. *David,* 134 F.3d at 478.

The remaining substantive claims, presented by the motion as Points I and III, assert that the defendant's trial attorney provided constitutionally defective assistance by failing to express an

opinion on, or to recommend acceptance of, "the 70 month plea offer." Defendant's Memorandum at 4. There is no evidence in the record that any such offer was made by the government. The defendant more accurately portrays the situation when he refers in the course of his argument to a sentencing range of 70 to 87 months that would have been available had he pleaded guilty and his offense level been reduced three levels under section 3E1.1 of the United States Sentencing Commission Guidelines ("U.S.S.G."). Defendant's Memorandum at 5. This reduction for acceptance of responsibility, a two-level adjustment that may be increased to three when the defendant notifies the government of his intention to plead guilty sufficiently in advance of trial to allow the government to avoid substantial preparation for trial, is available whether or not the defendant enters into a plea agreement. Accordingly, I will discuss this claim as one concerning the availability of the acceptance-of-responsibility adjustment, rather than one based on an offered plea agreement. This scenario is consistent with the letter from Assistant United States Attorney Dilworth to the defendant's attorney dated September 30, 1996, a copy of which is attached to the defendant's memorandum as evidence of the "plea offer." The letter merely informs the defendant's attorney of a deadline for notification of an intent to plead guilty after which the government will object to the additional one-level reduction available under U.S.S.G. § 3E1.1(b).

Even when the issue is cast in these terms, however, the defendant's submission suffers from a fatal deficiency. In order to establish the prejudice prong of the *Strickland* test, the defendant would have to submit, as a bare minimum, a sworn statement that, had his attorney advised him to plead guilty, he would have done so. *Johnson v. Duckworth*, 793 F.2d 898, 902 n.3 (7th Cir. 1986) (statement that defendant would have been *able* to plead guilty but for counsel's actions not enough; also suggesting that evidence that defendant *would have* pleaded guilty before conviction, but for

counsel's actions, required as well). Here, while the defendant asserts that, if his attorney had advised him that the sentencing range applicable to him after a three-level reduction pursuant to U.S.S.G. § 3E1.1 was 70 to 87 months, "he would have accepted the government's plea offer" of such a sentence, Defendant's Memorandum at 5, that assertion is unsworn. Accordingly, the court may not consider it, and in the absence of such evidence, the defendant cannot establish prejudice as required by *Strickland*. *See also Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991).

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 14th day of April, 1999.

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David M. Cohen
United States Magistrate Judge